

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

CECIL H. STINBRINK, JR.)	
Claimant)	
VS.)	
)	Docket No. 177,611
HEALTH CARE, INC.)	
Respondent)	
Self-Insured)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Respondent requested review of the Award dated July 22, 1996, entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on January 23, 1997.

APPEARANCES

Scott J. Mann of Hutchinson, Kansas, appeared for the respondent. Randall C. Henry of Hutchinson, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

ISSUES

The only issue before the Administrative Law Judge was whether the Workers Compensation Fund was responsible for any part of the benefits paid to claimant for a February 17, 1993, accident. The Judge found the Fund's responsibility was 50 percent.

The respondent requested the Appeals Board to review the Administrative Law Judge's finding and contends the Fund should be held totally responsible because,

according to respondent, claimant's accident would not have occurred "but for" claimant's preexisting multiple sclerosis. On the other hand, the Fund argues its liability should be limited to only 10 percent.

FINDINGS OF FACT

After reviewing the entire record, the Appeals Board finds as follows:

- (1) Claimant, a registered respiratory therapist, injured his low back on February 17, 1993, when he fell to the floor onto his buttocks while attempting to sit in a chair. The parties stipulated that claimant's accident arose out of and in the course of his employment with respondent.
- (2) Claimant settled his workers compensation claim with the respondent before a special administrative law judge on July 3, 1995. The parties have stipulated respondent has paid \$79,532.25 in temporary total, medical, and permanent partial general disability benefits in this claim.
- (3) There exists at least three versions of how the accident happened. Claimant testified he fell when a coworker named Sherry accidentally pulled the chair from beneath him as he began to sit. Minutes after the accident, claimant reported to his immediate supervisor, Lawrence Voth, that the chair slid out from underneath him as he attempted to sit. He did not mention to Mr. Voth that someone had pulled the chair away from him or that his knee buckled causing him to fall. In an incident report claimant prepared the day following the accident, he wrote his knee buckled as he attempted to sit in the chair and he fell as it rolled away.
- (4) After considering the entire record and the different versions of the accident, the Appeals Board finds claimant's accident occurred as a result of the chair sliding out from under him rather than from the residual effects of either multiple sclerosis or a prior back injury. Claimant denies his knee buckled and the Appeals Board is persuaded by that testimony. The greater weight of the evidence indicates the chair, which was on casters, rolled out from under claimant as he began to sit and it was the chair's rolling away from claimant which caused him to fall. As reported to Mr. Voth just minutes after the fall, the accident occurred because the chair rolled away from claimant.
- (5) Claimant has multiple sclerosis, a neurological disease, which was diagnosed in 1986. In 1980 he underwent a laminectomy and disectomy at the L4-5 intervertebral level. The February 1993 accident caused the L5-S1 disc to herniate prompting additional back surgery.
- (6) When claimant was hired by respondent in 1988, claimant reported his prior back injury and multiple sclerosis. Therefore, respondent hired claimant knowing he had significant physical impairments.

(7) Philip R. Mills, M.D., who is board certified in physical medicine and rehabilitation, testified claimant's previous back injury has contributed 50 percent to the resulting impairment. Dr. Mills was brought into this case upon a request from an administrative law judge for an independent medical evaluation.

(8) Board-certified orthopedic surgeon Terrance Tisdale, M.D., testified there was a 10 percent contribution from claimant's earlier back injury. Later, (and assuming the multiple sclerosis caused claimant's accident) the doctor testified that the multiple sclerosis contributed 50 percent and the prior back injury contributed 10 percent (for a total of 60 percent) to claimant's resulting impairment. However, if the multiple sclerosis was not a factor in the accident, Dr. Tisdale indicated the multiple sclerosis would contribute only 25 percent to claimant's resulting impairment which would reduce the 60 percent total contribution figure to 35 percent.

(9) The Appeals Board adopts the findings of the Administrative Law Judge to the extent they are not inconsistent with the above.

CONCLUSIONS OF LAW

When an employer knowingly either hires or retains a worker with an impairment which constitutes a handicap in obtaining or retaining employment, the Workers Compensation Fund may be held liable for later industrial accidents. See K.S.A. 1992 Supp. 44-567 which provides in part:

"(a) An employer who operates within the provisions of the workers compensation act and who knowingly employs or retains a handicapped employee, as defined in K.S.A. 44-566 and amendments thereto shall be relieved of liability for compensation awarded or be entitled to an apportionment of the costs thereof as follows:

"(1) Whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director awards compensation therefor and finds the injury, disability or the death resulting therefrom probably or most likely **would not have occurred but for the preexisting physical or mental impairment** of the handicapped employee, all compensation and benefits payable because of the injury, disability or death shall be paid from the workers' compensation fund.

"(2) Subject to the other provisions of the workers compensation act, whenever a handicapped employee is injured or is disabled or dies as a result of an injury and the director finds the injury probably or most likely **would have been sustained or suffered without regard to the employee's preexisting physical or mental impairment** but the resulting disability or death was contributed to by the preexisting impairment, the director shall determine in a manner which is equitable and reasonable the amount of disability and proportion of the cost of award which is attributable to the employee's

preexisting physical or mental impairment, and the amount so found shall be paid from the workers' compensation fund. (Emphasis added.)

The respondent has established knowledge of claimant's physical impairments at the time of hiring. The Appeals Board finds claimant's impairments were of such character as to constitute a hardship in obtaining or retaining employment. See K.S.A. 44-566.

As indicated above, the Appeals Board finds the February 1993 accident occurred because the chair rolled away from claimant as he began to sit rather than as a result of any preexisting impairment. Therefore, the Appeals Board finds that the accident would have occurred regardless of claimant's preexisting impairment and disability.

The Appeals Board finds claimant's preexisting impairment has contributed 50 percent to claimant's ultimate impairment. That conclusion is based upon Dr. Mills' persuasive testimony and opinions regarding the contribution from the impairment arising from the earlier L4-5 laminectomy and diskectomy as it relates to the resulting impairment and disability. As stated above, Dr. Mills was brought into this proceeding for his noted expertise and as a disinterested witness. Therefore, based upon the above, the Award entered by the Administrative Law Judge should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award dated July 22, 1996, entered by Administrative Law Judge Bruce E. Moore should be, and hereby is, affirmed.

IT IS SO ORDERED.

Dated this ____ day of February 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Hutchinson, KS
Randall C. Henry, Hutchinson, KS
Bruce E. Moore, Administrative Law Judge
Philip S. Harness, Director